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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

NAFIS RASHADEEM, ) No. CV 09-7438 CW  
)  
Plaintiff, ) DECISION AND ORDER  
v. )  
)  
MICHAEL J. ASTRUE, )  
Commissioner, Social Security )  
Administration, )  
)  
Defendant. )  
\_\_\_\_\_)

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner's denial of disability benefits. As discussed below, the court finds that the Commissioner's decision should be reversed and this matter remanded for payment of benefits for the closed period of August 23, 2003, to January 1, 2007.

I. BACKGROUND

Plaintiff Nafis Rashadeem was born on March 5, 1961, and was forty-five years old on the date that his alleged period of disability

1 expired. [Administrative Record ("AR") 63, 423.] He has two years of  
2 college education and past relevant work experience as an automobile  
3 salesperson, technical support and construction worker. [AR 374, 465-  
4 466.] Plaintiff alleges disability on the basis of a stroke, sleep  
5 apnea and obesity. [AR 374.]

## 6 **II. PRIOR PROCEEDINGS**

7 Plaintiff applied for a period of disability and disability  
8 insurance benefits ("DIB") and supplemental security income ("SSI") on  
9 June 10, 2004, alleging disability since August 23, 2003. [AR 423.]  
10 After the application was denied initially and upon reconsideration,  
11 Plaintiff requested an administrative hearing, which was held on March  
12 8, 2006, before an Administrative Law Judge ("ALJ"). [AR 371.]  
13 Plaintiff appeared with counsel, and testimony was taken from  
14 Plaintiff and vocational expert Mr. Hatokeyama. [AR 372.] The ALJ  
15 denied benefits in a decision dated April 12, 2006. [AR 338-45.] On  
16 October 4, 2006, the Appeals Council remanded the matter for further  
17 administrative proceedings. [AR 356-57.] A second administrative  
18 hearing was held on January 22, 2007. [AR 394.] Plaintiff appeared  
19 with counsel, and testimony was taken from Plaintiff. [AR 395.] The  
20 ALJ denied benefits in a decision dated March 13, 2007. [AR 12-21.]  
21 When the Appeals Council denied review on May 29, 2007, the ALJ's  
22 decision became the Commissioner's final decision. [AR 7.]

23 Plaintiff filed a complaint in the district court on July 26,  
24 2007 (Case No. CV 07-4766 CW). On April 15, 2008, the court issued a  
25 decision and order remanding the matter for further administrative  
26 proceedings.

27 A third administrative hearing was held on January 26, 2009,  
28 before a new ALJ. [AR 455.] Plaintiff appeared with counsel, and

1 testimony was taken from Plaintiff and vocational expert June Hagen.  
2 [AR 456.] Because Plaintiff had resumed working on January 1, 2007,  
3 Plaintiff amended his application to a closed period of disability  
4 from August 23, 2003, to January 1, 2007. [AR 450.] The ALJ denied  
5 benefits in a decision dated March 26, 2009. [AR 420.]

6 The present complaint was lodged on October 14, 2009, and filed  
7 on October 15, 2009. On June 10, 2010, Defendant filed an Answer and  
8 Plaintiff's Administrative Record ("AR"). On September 21, 2010, the  
9 parties filed their Joint Stipulation ("JS") identifying matters not  
10 in dispute, issues in dispute, the positions of the parties, and the  
11 relief sought by each party. This matter has been taken under  
12 submission without oral argument.

### 13 **III. STANDARD OF REVIEW**

14 Under 42 U.S.C. § 405(g), a district court may review the  
15 Commissioner's decision to deny benefits. The Commissioner's (or  
16 ALJ's) findings and decision should be upheld if they are free of  
17 legal error and supported by substantial evidence. However, if the  
18 court determines that a finding is based on legal error or is not  
19 supported by substantial evidence in the record, the court may reject  
20 the finding and set aside the decision to deny benefits. See Aukland  
21 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.  
22 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240  
23 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,  
24 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.  
25 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada  
26 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

27 "Substantial evidence is more than a scintilla, but less than a  
28 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence

1 which a reasonable person might accept as adequate to support a  
 2 conclusion." Id. To determine whether substantial evidence supports  
 3 a finding, a court must review the administrative record as a whole,  
 4 "weighing both the evidence that supports and the evidence that  
 5 detracts from the Commissioner's conclusion." Id. "If the evidence  
 6 can reasonably support either affirming or reversing," the reviewing  
 7 court "may not substitute its judgment" for that of the Commissioner.  
 8 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

#### 9 **IV. DISCUSSION**

##### 10 **A. THE FIVE-STEP EVALUATION**

11 To be eligible for disability benefits a claimant must  
 12 demonstrate a medically determinable impairment which prevents the  
 13 claimant from engaging in substantial gainful activity and which is  
 14 expected to result in death or to last for a continuous period of at  
 15 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at  
 16 721; 42 U.S.C. § 423(d)(1)(A).

17 Disability claims are evaluated using a five-step test:

18 Step one: Is the claimant engaging in substantial  
 19 gainful activity? If so, the claimant is found not  
 20 disabled. If not, proceed to step two.

21 Step two: Does the claimant have a "severe" impairment?  
 22 If so, proceed to step three. If not, then a finding of not  
 23 disabled is appropriate.

24 Step three: Does the claimant's impairment or  
 25 combination of impairments meet or equal an impairment  
 26 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If  
 27 so, the claimant is automatically determined disabled. If  
 28 not, proceed to step four.

Step four: Is the claimant capable of performing his  
 past work? If so, the claimant is not disabled. If not,  
 proceed to step five.

Step five: Does the claimant have the residual  
 functional capacity to perform any other work? If so, the  
 claimant is not disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended

1 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107  
 2 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20  
 3 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or  
 4 "not disabled" at any step, there is no need to complete further  
 5 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

6 Claimants have the burden of proof at steps one through four,  
 7 subject to the presumption that Social Security hearings are non-  
 8 adversarial, and to the Commissioner's affirmative duty to assist  
 9 claimants in fully developing the record even if they are represented  
 10 by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at  
 11 1288. If this burden is met, a prima facie case of disability is  
 12 made, and the burden shifts to the Commissioner (at step five) to  
 13 prove that, considering residual functional capacity ("RFC")<sup>1</sup>, age,  
 14 education, and work experience, a claimant can perform other work  
 15 which is available in significant numbers. Tackett, 180 F.3d at 1098,  
 16 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

#### 17 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

18 Here, the ALJ found that Plaintiff had not engaged in substantial  
 19 gainful activity from October 23, 2003, to January 1, 2007 (step one);  
 20 that Plaintiff had "severe" impairments, namely a history of  
 21 cerebrovascular accident, obesity, obstructive sleep apnea,  
 22 hypertension, and adjustment disorder (step two); and that Plaintiff

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23  
 24 <sup>1</sup> Residual functional capacity measures what a claimant can  
 25 still do despite existing "exertional" (strength-related) and  
 26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155  
 27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to  
 28 work without directly limiting strength, and include mental, sensory,  
 postural, manipulative, and environmental limitations. Penny v.  
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155  
 n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a  
 nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,  
 765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 did not have an impairment or combination of impairments that met or  
2 equaled a "listing" (step three). [AR 426.] The ALJ found that for  
3 the period in question, Plaintiff had an RFC for light work, except  
4 for any work involving more than simple two to three step tasks or  
5 requiring sustained periods of concentration. [AR 427.] The vocational  
6 expert testified that a person with Plaintiff's RFC could perform  
7 Plaintiff's past relevant work as a construction site cleaner (step  
8 four). [AR 431.] Accordingly, the ALJ found that Plaintiff was not  
9 "disabled" as defined by the Social Security Act. [Id.]

#### 10 **C. ISSUES IN DISPUTE**

11 The parties' Joint Stipulation identifies the following disputed  
12 issues:

- 13 1. Whether the ALJ erred in the evaluation of Plaintiff's  
14 obstructive sleep apnea impairment and its impact on his  
15 ability to work;
- 16 2. Whether the ALJ erred in the evaluation of Plaintiff's  
17 obesity impairment and its impact on his ability to work;  
18 and
- 19 3. Whether the ALJ erred in the credibility findings.

20 [JS 3.]

21 As discussed below, Issue Three is dispositive.

#### 22 **D. ISSUE THREE: CREDIBILITY EVALUATION**

23 At the administrative hearing of January 22, 2007, Plaintiff  
24 testified, among other things, that he could only walk about a block,  
25 and could not work at a job that requires him just to sit. [AR 406-  
26 407.] He also testified that he is continuously fatigued and tired,  
27 falls asleep at least three to four times during the day, and had lost  
28 twelve percent feeling on his right side after a stroke. [AR 459-460,

1 461, 464.]

2 The ALJ referenced this portion of Plaintiff's testimony in the  
3 administrative decision and stated the following reasons for finding  
4 that Plaintiff's statements were "not credible to the extent they are  
5 inconsistent with the . . . residual functional capacity assessment."  
6 [AR 430.] First, the ALJ stated that the medical record "fails to  
7 demonstrate that the claimant was physically or mentally fatigued to  
8 the degree he alleges," explaining that with the exception of Dr.  
9 Scott Kopoian, an examining psychiatrist, none of the doctors  
10 mentioned "fatigue related symptoms." [AR 431.] In addition, even  
11 with assuming Plaintiff had fatigue, Dr. Kopoian found that Plaintiff  
12 was still able to "perform 2-3 step tasks and interact appropriately  
13 with others." [Id.] Second, the ALJ found that Plaintiff did not  
14 always comply with taking anti-hypertensive medication or in losing  
15 weight with diet and exercise, as recommended. [Id.] Third, the ALJ  
16 found that Plaintiff's testimony about his limitations were  
17 inconsistent with Plaintiff's activities of daily living as reported  
18 to Dr. Kopoian.<sup>2</sup> [Id.]

19 The standard in the Ninth Circuit for evaluations of subjective  
20 symptom testimony in Social Security disability cases requires, first,  
21 that the claimant produce medical evidence of an underlying impairment  
22 which is reasonably likely to be the cause of the alleged symptom;  
23 when this evidence is produced, the Commissioner may not reject a  
24 claimant's credibility without specifically making findings which

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26 <sup>2</sup> Plaintiff told Dr. Kopoian he "performs all activities of  
27 daily living without assistance," but specifically stated that he  
28 visits the doctor; reads the newspaper; sometimes shops for groceries,  
usually with someone else; occasionally visits malls; and stopped  
going to movies. [AR 279.]

1 support that conclusion. Bunnell v. Sullivan, 947 F.2d 341, 345 (9th  
2 Cir. 1991)(en banc)(affirming standard of Cotton v. Bowen, 799 F.2d  
3 1403, 1407 (1986), for review of ALJ evaluations of pain and  
4 subjective symptom testimony). The credibility determination must  
5 state "clear and convincing" reasons that include a specific statement  
6 of which symptom testimony is not credible and what facts in the  
7 record lead to that conclusion. Smolen v. Chater, 80 F.3d 1273, 1284  
8 (9th Cir. 1996)(citing Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir.  
9 1993)); see also Lester v. Chater, 81 F.3d at 834 ("For the ALJ to  
10 reject the claimant's complaints, [the ALJ] must provide specific,  
11 cogent reasons for the disbelief"). A claimant's subjective pain does  
12 not need to be affirmed by objective medical evidence, as long as the  
13 pain is "associated with such an impairment." Magallanes v. Bowen, 881  
14 F.2d 747, 755 (9th Cir. 1989). On the other hand, the ALJ may  
15 consider certain factors in evaluation of a claimant's credibility:  
16 1) ordinary techniques of credibility evaluation; 2) unexplained or  
17 inadequately explained failure to seek treatment or to follow  
18 prescribed activities; and 3) daily activities. See Smolen, 80 F.3d at  
19 1284.

20 Here, Plaintiff satisfied the initial requirement of producing  
21 medical evidence of an underlying impairment to warrant such an  
22 evaluation. Moreover, the pain that Plaintiff is experiencing is  
23 reasonably associated with such impairments. There is no dispute that  
24 Plaintiff has sleep apnea, and that fatigue would be associated with  
25 such an impairment.

26 Accordingly, the Commissioner must provide "clear and convincing"  
27 reasons to discount Plaintiff's testimony. The ALJ initially pointed  
28 out that Plaintiff failed to carry out prescribed treatment by not



1 taking anti-hypertensive medication. Lack of compliance with  
2 medication plans is "a factor that the ALJ can consider in his  
3 credibility analysis." Tonapetyan, 242 F.3d at 1148. Dr. Albeer  
4 Ibrahim, one of Plaintiff's treating physicians, had stated once that  
5 Plaintiff poorly complied with his medication. [AR 251.] However,  
6 this single, isolated statement from a voluminous record is not a  
7 "clear and convincing" reason to establish that Plaintiff's alleged  
8 limitations are not as severe as he testified.

9 Plaintiff's non-compliance in losing weight with diet and  
10 exercise is also not a clear and convincing reason to reject  
11 Plaintiff's testimony. According to the record, Drs. Brandes and  
12 Ibrahim recommended to Plaintiff that he lose weight. [AR 235-236,  
13 253.] Dr. Brandes, who had specifically evaluated and treated  
14 Plaintiff for sleep apnea, had stated that sleep apnea is worsened by  
15 obesity, and therefore, Plaintiff should be encouraged to lose weight.  
16 [AR 235.] The ALJ determined that since Plaintiff did eventually lose  
17 30 to 40 pounds and was able to return to work, it would be reasonable  
18 to conclude that Plaintiff's physical functioning would have improved  
19 if he had lost weight earlier by complying with the doctors'  
20 recommendations. [AR 431.]

21 The ALJ's statement wrongfully assumes that since Plaintiff later  
22 lost thirty to forty pounds, he also had the ability to lose the same  
23 amount of weight during the relevant period. The ability to lose  
24 weight is not necessarily amenable to a time schedule despite diet,  
25 exercise, or change in lifestyle. That is why the Ninth Circuit has  
26 held that, "We will rarely use 'failure to follow prescribed  
27 treatment' for obesity to deny or cease benefits," in light of the  
28 generally low success rate of obesity treatment, "despite the efforts

1 of the individual to maintain the loss." Orn v. Astrue, 495 F.3d 625,  
2 636-637 (9th Cir. 2007) (citing Social Security Ruling ("SSR") 02-1p,  
3 2000 WL 628049 at \*2).

4 "Before failure to follow prescribed treatment for obesity can  
5 become an issue in a case, we must first find that the individual is  
6 disabled because of obesity or a combination of obesity and another  
7 impairment(s)." Id. at 636. Here, Petitioner had not been found  
8 disabled for the period in question, so the ALJ is precluded "from  
9 considering the effect of any failure to follow treatment for  
10 obesity." Id. Moreover, the treatment for obesity in this context  
11 must be "prescribed." Id. at 637. A doctor's statement that an  
12 individual "should" lose weight and is "advised" to exercise is not  
13 enough to be considered a "prescribed treatment." Id. The record does  
14 not clearly indicate that Plaintiff was directed to diet or exercise  
15 as prescribed treatment. At most, one of the doctors suggested that  
16 there was a behavioral weight loss program available at the hospital.  
17 [AR 235.] Accordingly, Plaintiff's failure to follow a recommendation  
18 to lose weight is not a clear and convincing reason to find  
19 Plaintiff's testimony not credible.

20 Second, the ALJ found that Plaintiff's testimony was inconsistent  
21 with his daily activities. [AR 431.] Although Petitioner told Dr.  
22 Kopoian that he "performs all activities of daily living without  
23 assistance," such activities appeared to be limited to visiting the  
24 doctor, reading the newspaper, shopping for groceries (usually with  
25 someone else), and occasional visits to the mall. [AR 279.] It is  
26 well-settled that a claimant is not required to be "utterly  
27 incapacitated" since "many home activities are not easily transferable  
28 to what may be the more grueling environment of the workplace." Fair

1 v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989). Here, it is not clear  
2 that Plaintiff's ability to read the newspaper, shop for groceries  
3 with others, and occasionally visit malls is transferable to a work  
4 environment. See Vertigan v. Halter, 260 F.3d 1044, 1049-1050 (9th  
5 Cir. 2001) (holding that the ALJ erred in relying on the claimant's  
6 testimony that she was able to go grocery shopping with assistance,  
7 walk approximately an hour in the malls, get together with her  
8 friends, play cards, swim, watch television, read, and exercise at  
9 home because those activities did not "consume a substantial part of"  
10 her day and were not necessarily transferable to a work setting).  
11 Hence, this is not a clear and convincing reason to reject Plaintiff's  
12 testimony.

13 Finally, the ALJ cited lack of objective medical evidence to  
14 corroborate "that the claimant was physically or mentally fatigued to  
15 the degree he alleges." It is well-settled, however, that an ALJ may  
16 not discredit a claimant's allegations of the severity of pain solely  
17 on the ground that the allegations are unsupported by objective  
18 medical evidence. Bunnell v. Sullivan, 947 F.2d at 345. Here,  
19 without regard to whether this final reason was clear and convincing,  
20 the other reasons were not, as discussed previously; therefore, this  
21 ground is inadequate to support the Commissioner's credibility  
22 determination.

#### 23 **E. REMAND FOR PAYMENT OF BENEFITS**

24 The decision whether to remand for further proceedings is within  
25 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,  
26 1175-1178 (9th Cir. 2000). Where there are outstanding issues that  
27 must be resolved before a determination can be made, and it is not  
28 clear from the record that the ALJ would be required to find the

1 claimant disabled if all the evidence were properly evaluated, remand  
2 is appropriate. Id. at 1179. However, where no useful purpose would  
3 be served by further proceedings, or where the record has been fully  
4 developed, it is appropriate to exercise this discretion to direct an  
5 immediate award of benefits. Id. (decision whether to remand for  
6 further proceedings turns upon their likely utility).


7 In Plaintiff's case, as discussed above, the credibility  
8 determination was not supported by clear and convincing reasons.  
9 Accordingly, Plaintiff's testimony is credited as true. Id.; Benecke  
10 v. Barnhart, 379 F.3d 587, 594 (9th Cir. 2004); Varney v. Sec. of  
11 Health and Human Servs., 859 F.2d 1396, 1398 (9th Cir. 1988).  
12 Moreover, the vocational expert testified that a person with  
13 Plaintiff's testified limitations would be unable to perform gainful  
14 employment in the national economy. [AR 471.] Accordingly, a finding  
15 of disability is mandated by the record, and an award of benefits for  
16 the closed period of August 23, 2003, to January 1, 2007, is  
17 appropriate.

18 **V. ORDERS**

19 Accordingly, **IT IS ORDERED** that:

- 20 1. The decision of the Commissioner is **REVERSED**.  
21 2. This action is **REMANDED** to Defendant for payment of benefits  
22 for the period of August 23, 2003, to January 1, 2007.  
23 3. The Clerk of the Court shall serve this Decision and Order  
24 and the Judgment herein on all parties or counsel.

25  
26 DATED: November 16, 2010

27   
28 CARLA M. WOHRLE  
United States Magistrate Judge